



NATURAL RESOURCES DEFENSE COUNCIL

**CHATTEN-BROWN & CARSTENS**

3250 OCEAN PARK BOULEVARD #300

SANTA MONICA, CALIFORNIA 90405

E-MAIL: CBC@CBCEARTHLAW.COM

TELEPHONE: (310) 314-8040

FACSIMILE: (310) 314-8050

August 13, 2007

***Via Facsimile and U.S. Mail***

City of Los Angeles  
Board of Public Works  
Room 361-P, Mailstop 464  
200 North Spring Street  
Los Angeles, CA 90012-4801  
Fax: 213-978-0279

Gary Lee Moore  
City Engineer  
Bureau of Engineering  
1149 S. Broadway St., Suite 700,  
Los Angeles, CA 90015  
Mail Stop 490  
Fax: 213-485-4923

***Re: Appeal From Board of Public Works August 8, 2007 Decision To Issue  
B-Permit For Work Specified For The Tract 35022 (Elephant Hill)***

Dear Members of the Board of Public Works, and Mr. Moore:

Pursuant to California Public Resources Code Section 21151(c), the Natural Resources Defense Council ("NRDC") hereby appeals from the August 8, 2007 decision of the Board of Public Works to issue a B-Permit for work specified for tract 35022 in the area known as Elephant Hill (the "B-Permit approval"). We understand that this appeal will be heard by the Los Angeles City Council, and we request that it be calendared for hearing as soon as possible.

The appeal is made on these grounds:

1. The B-Permit approval is inconsistent with and expressly rejects the validity of the June 20, 2007 decision of the Los Angeles City Council to require a supplemental environmental impact report for the Pueblo Subdivision, which includes the Elephant Hill area.

2. The B-Permit approval is invalid under the California Environmental Quality Act ("CEQA") because the Board of Public Works improperly concluded that approval was a ministerial, not a discretionary action. The proposed project includes a road on both private and public land. Los Angeles Municipal Code ("LAMC") Chapter Section § 62.105 states in part:

(a) No person shall lay, construct, reconstruct or repair in any street or in, over or through any property or right of way owned by or under the control of the City, any curb, sidewalk, gutter, driveway, approach, roadway surface, pavement, sanitary sewer, sewage works, storm drain, culvert, stairway, retaining wall or similar structure, building or improvement, or perform any grading or filling, or subject any sewer or storm drain to excessive live or dead loading without first obtaining written permit therefor from the Board and without first obtaining ***approval of plans and specifications and the lines and grades therefor from the City Engineer***. (Amended by Ord. No. 115,316, Eff. 2/15/60.)

(b) Any person who desires to make any such improvement upon any private property not dedicated to a public use, may, in order to obtain the City Engineer's ***approval of plans and specifications*** therefor, city inspection and supervision of the work and to assure that the improvement when completed will be ***to the satisfaction of the City Engineer*** and that his ***acceptance*** thereof will be available if the improvement be later submitted for dedication to public use, apply for and obtain a permit therefore... and the City Engineer ***may impose such other conditions as may, in his discretion, be required*** to assure that the work . . . will not cause loss or damage to the City or to the public, and that the improvements when completed, will be acceptable for public use. . . . (Amended by Ord. No. 83,881, Eff. 2/4/41.)

... ..

***Nothing in this subsection shall be deemed to bind the City to accept such improvements*** for public use, however, ***if for any reason*** said improvements are ***not in a condition satisfactory to the City Engineer*** at the time they are offered for acceptance for public use. (Amended by Ord. No. 83,881, Eff. 2/4/41.)<sup>1</sup>

The conclusion that the B-permit in question is discretionary finds further support in CEQA and relevant case law. According to the CEQA Guidelines, the issuance of building permits is presumed to be ministerial "in the absence of any discretionary provision contained in the local ordinance or other law."<sup>2</sup> Such lack of discretion exists *only* where the approving agency retains no discretion to exercise subjective judgment regarding carrying out of any phase of the proposed project.<sup>3</sup> Moreover, a project of "mixed ministerial-discretionary character... should be treated

<sup>1</sup> LAMC § 62.105 (emphasis added).

<sup>2</sup> 14 C.C.R. § 15268.

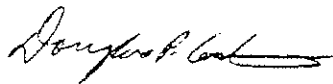
<sup>3</sup> *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 269-271.

as a discretionary project.”<sup>4</sup> And courts have been united in concluding that statements providing for the exercise of judgment, expertise or discretion remove the permit from ministerial action.<sup>5</sup> Finally, to the extent that uncertainty exists as to whether an action approving a project is discretionary or ministerial, that uncertainty must be resolved in favor of discretionary review.<sup>6</sup> In other words, the determination of whether a permit is discretionary or ministerial is subject to a low threshold for determining that it is, in fact, discretionary.

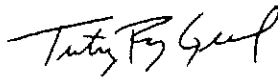
Here, the City Engineer clearly exercises judgment and discretion in granting a B-permit. The City Engineer must give “approval of plans and specifications” and must further grant his “acceptance” after making the determination that the work is to his “satisfaction.”<sup>7</sup> And the City Engineer is empowered to “impose such other conditions as may, *in his discretion*, be required.”<sup>8</sup> The section concludes by stating that “[n]othing ... shall be deemed to bind the City to accept such improvements for public use... if for any reason said improvements are not... satisfactory to the City Engineer.”<sup>9</sup> The Department of Public Works issuance of a B-permit for work in a public right-of-way is, unequivocally, discretionary, and the Department was wrong to conclude otherwise.

Please contact the undersigned with any questions. We look forward to a full hearing before the City Council.

Sincerely,



Doug Carstens  
Chatten-Brown & Carstens



Tim Grabiell  
Natural Resources Defense Council

cc: Susan D. Pfann (Fax: 213-978-8214)  
Maria Mejia (Fax: 818-353-8444)  
David Pettit  
Joel Reynolds

---

<sup>4</sup> *Day v. City of Glendale* (1975) 51 Cal.App.3d 817, 823; *see also, People v. Department of Housing and Community Development* (1975) 45 Cal.App.3d 185, 194.

<sup>5</sup> *See, e.g., Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 506; *Friends of Westwood*, 191 Cal.App.3d at 272-273.

<sup>6</sup> *Day, supra*, 51 Cal.App.3d at 823.

<sup>7</sup> LAMC § 62.105(b).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*